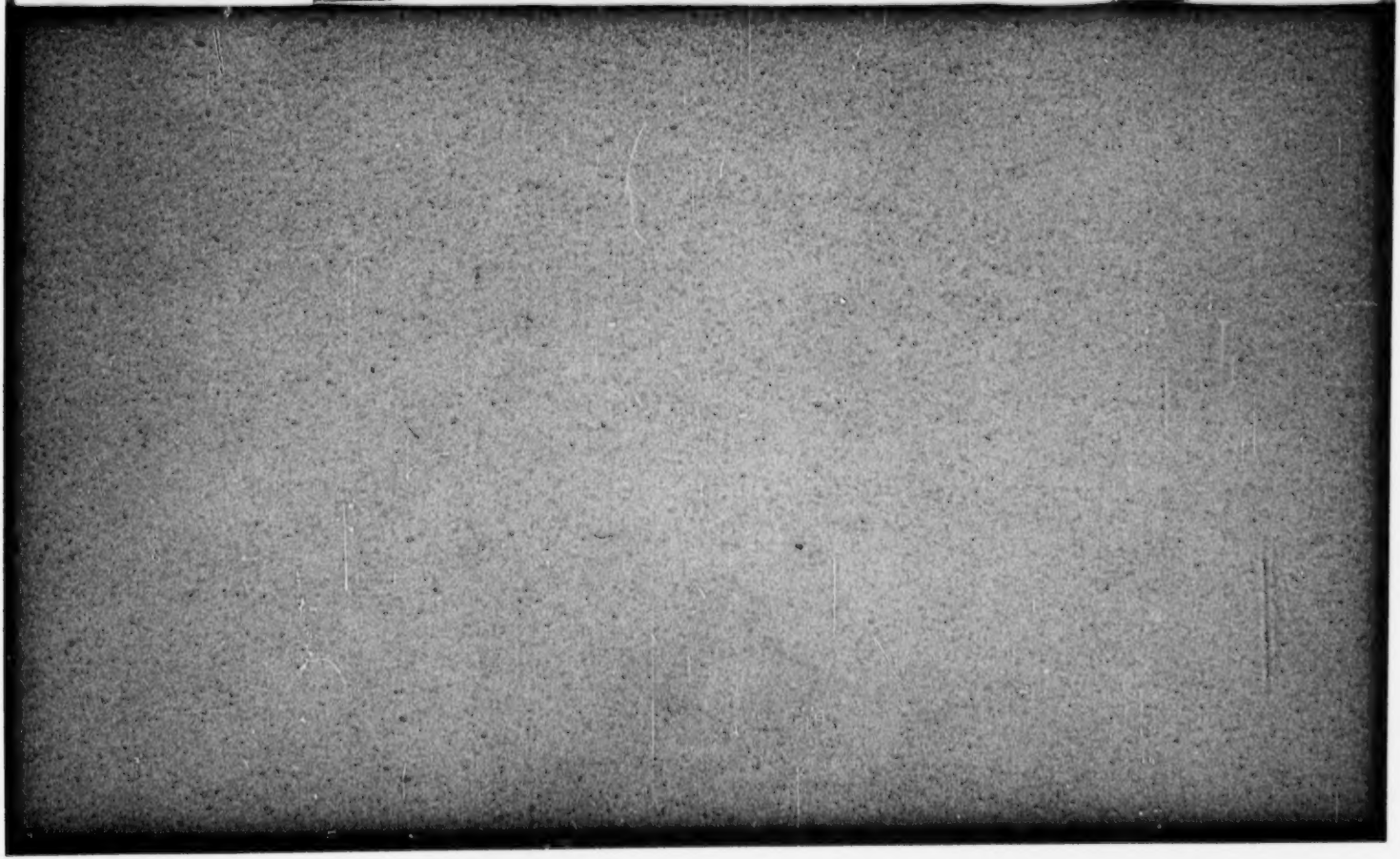

SUPREME COURT, U. S.

NO. 73-1656

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

TERRY GENE SIMMONS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is not yet reported but is reproduced in Petitioner's Petition.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the petition although Respondent disputes Petitioner's contention that any rights quaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner raises the following questions in his petition for a writ of certiorari.

1. Whether or not the prosecution improperly suppressed exculpatory evidence relating to the critical issue of identification of the Petitioner.

2. Whether or not the Court below erred in failing to grant the defendant's motion to suppress his confession because it was tainted by his illegal detention resulting from his illegal arrest.

3. Whether or not the Court below erred in overturning Petitioner's motion to suppress his confessions which were taken in the planned absence of counsel.

4. Whether or not the Court below erred in refusing to suppress the Petitioner's confession in view of the evidence which showed it to be involuntary and inadmissible as a matter of law.

STATEMENT OF THE CASE

Petitioner was indicted (R-4) for and found guilty of (R-184) the murder with malice of Martha Ann Cook by drowning her in water (R-4). Punishment was set by the jury at ninety-nine (99) years and one day imprisonment (R-104). After sentencing (R-252), Petitioner gave notice of appeal (R-203), the court ordered a free statement of facts (R-204), the record on appeal, including statement of facts, being more than 2,800 pages.

Petitioner was represented at his state court trial by counsel of his choice, Mr. Jimmy James; Mr. Ray Moses; and Mr. Frank Price (R-230), and is represented by Mr. James in this petition.

Evidence at the trial on the merits showed that Mrs. Margaret Cook of 4823 Chantilly, Houston, in Harris County (R-1415), had, on August 2, 1971, as her immediate family, her husband, Robert, two sons, David 20, and Timmy 15, and three daughters, Sandy 18, Martha 16, and Norma 7 (R-1416).

About 3:30 p.m. (R-1416) Mrs. Cook left her home, taking Norma and Martha with her (R-1417, R-1418). She locked all the doors to the house when she left (R-1418). While she was gone, the house was burglarized, and the entire family was notified of this (R-1448).

The next day, August 4, 1971, was the first day of Vacation Bible School, at which Mrs. Cook taught, and

for which Mrs. Cook left just before 9:00 a.m., taking seven-year old Norma and leaving Martha, wearing nightclothes (R-1451) asleep in her bed (R-1449), in the front bedroom on the north.

The doors were locked when Mrs. Cook left (R-1452) at 9:00 a.m. (R-1449) for the White Oak Baptist Church at 3615 Mangum Road, about half-a-mile from her home (R-1453). She returned at 12:15 p.m. (R-1453).

The utility room door, locked when she left (R-1456), was unlocked (R-1455), the phone was off the hook (R-1456), the television set from Mrs. Cook's bedroom was gone (R-1457), sheets were off Martha's bed (R-1465) and Martha was not there (R-1476). Mrs. Cook never again saw her daughter Martha alive (R-1476).

Sandra Kay Cook (R-1480), Martha's sister, was working (R-1480) at the Heights Hospital that morning, and tried to call home about 10:30 a.m. The phone rang but there was no answer. A few minutes later she called back and the phone had a busy signal, which continued at 10 or 15 minute intervals until 1:00 p.m. (R-1481), when she saw police cars as she passed her house going to a friend's house (R-1482).

Petitioner's written confession (R-2713) explains that he burglarized the Cook home August 3, 1971, and returned August 4, 1971, to get property he could not carry away the first time. While the second burglary

was in progress, Martha surprised him. He tied her up and made her leave with him (R-2713), and drowned her (R-2714).

ARGUMENT AND AUTHORITIES

1. THE PROSECUTION DID NOT IMPROPERLY SUPPRESS EXCULPATORY EVIDENCE RELATING TO THE CRITICAL ISSUE OF IDENTIFICATION OF THE PETITIONER.

Petitioner in his claim of suppression of evidence before this Court speaks sometimes of an offense report, sometimes of evidence which was given out of the jury's presence, sometimes of evidence taken in the jury's presence, and then seeks to include all of this as part of the offense report which the assistant district attorney in perfectly good faith, considered unimportant because of these facts.

> "MR. STOVER: Well, I have never had a statement from the woman, and this was only one of numerous blind leads that were run down between the time of Martha Ann Cook's disappearance and the discovery of her body. I understand that there were many situations such as that — citizens calling in and throwing notes out of cars, and such as that." (R-2020, lines 2-9).

The offense report, (R-2798, 2799), reflects only that Officer Turbeville was told by his sergeant that a subject had called a Houston radio station and reported to them that she had seen the missing girl at a Shell

service station. Officer Trubeville and Officer Ward then proceeded to the service station. The lady was still at the service station and identified herself to the officers as Mrs. Janis Arnold. She told the officers that she had taken her son to the restroom at the service station and that while they were in the restroom a lady came in with a teenage girl who was crying. The girl said "please help me", and Mrs. Arnold thought that the girl was directing this to the lady who was with her. The woman and girl then came out of the restroom and got into a car, and the girl then lay down in the back seat. At the time the car door was open and Mrs. Arnold noticed a black TV or phonorgraph sitting in the floorboard of the back seat. A man who the lady called Ernest was sitting behind the steering wheel, and the lady got in on the passenger side of the front seat and the car drove off with the girl lying down in the back seat on a pillow.

The officers showed Mrs. Arnold a mug shot of a man named Ernest Ira Fields, and she stated this was the man in the car. She stated that if this man were wearing sun glasses she could be more definite. The officers then obtained a xerox copy of the mug shot of Fields, and Mrs. Arnold then drew sun glasses on him and stated that this was definitely the man in the car. Officer Turbeville then talked with the attendant at the service station and he remembered waiting on the car but did not remember anything other than the fact that the man in the car was a white man, was large, and wore dark sun glasses.

Petitioner completely ignores the fact that both Officer Turbeville and Officer Ward testified that they had independent recollection of the meeting with Mrs. Arnold and that they talked to her on the morning of August 6, 1971, and she told them that the event she had witnessed had taken place a couple of hours earlier that same day, that is, August 6, 1971. (R-2292, 2311, 2320, 2324). The deceased was found the next day, August 7, 1971, and the medical examiner's examination of the girl's body showed she had been dead three to four days. (R-2117, lines 22-24). The offense report reflected that although Mrs. Arnold gave a general description of the girl in the car and the description resembled the deceased, it was only when Mrs. Arnold was called to testify by the defense at the state court trial that she testified she had identified photographs of the deceased. (R-2302). The offense report made no mention of this identification.

In view of the well established time of the deceased's death two days before Mrs. Arnold's alleged identification, and in view of the fact that Mrs. Arnold gave no statements concerning her identification, it is understandable why the assistant district attorney considered this one of the numerous blind leads that were run down between the time of the deceased's disappearance and the discovery of her body.

This Court held in *Moore v. Illinois*, 408 U.S. 786 (1972), that

> "We know of no constitutional requirement that the prosceution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive 'Slick' was an early lead the police abandoned when eye witnesses to the killing and witnesses to Moore's presence at the Ponderosa were found."

Mrs. Arnold's statements were likewise abandoned when the deceased's body was found the day after Mrs. Arnold said she saw her, because medical evidence proved that the girl had been dead three or four days at this time.

In any event, the defense was able to present Mrs. Arnold's testimony to the jury, so clearly no harm is shown. The prosecutor did not have in his file offense reports that revealed the existance of a witness whose testimony was highly exculpatory to the Petitoner. In view of the petitioner's motion

> "For the production of any evidence or information in the possession or subject to the control of the State or known to agents of the State which is inconsistent with the alleged guilt of the Defendant, . . ." (R-15)

there is no bad faith or harm shown, for the proof was fully made before the jury and Petitioner declines even now to claim that any different theory of defense would have been attempted had this one of many blind leads been made available to him at an earlier time. Respondent would further state that in view of the Petitioner's

statements of guilt which were introduced into evidence, the alleged suppressed evidence was not material to the issue of guilt.

The next three questions raised by Petitioner relate to the admission and voluntariness of his confession into evidence and will be grouped together and answered together by Respondent.

2. THE COURT BELOW DID NOT ERR IN FAILING TO GRANT THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION BECAUSE IT WAS TAINTED BY HIS ILLEGAL DETENTION RESULTING FROM HIS ILLEGAL ARREST.

3. THE COURT BELOW DID NOT ERR IN OVERTURNING PETITONER'S MOTION TO SUPPRESS HIS CONFESSIONS WHICH WERE TAKEN IN THE PLANNED ABSENCE OF COUNSEL.

4. THE COURT BELOW DID NOT ERR IN REFUSING TO SUPPRESS THE PETITONER'S CONFESSION IN VIEW OF THE EVIDENCE WHICH SHOWED IT TO BE INVOLUNTARY AND INADMISSIBLE AS A MATTER OF LAW.

Prior to his trial, Petitioner filed a motion to suppress any oral and written confessions made by him. During the trial, prior to the offering of the state of any tes-

timony concerning confessions, a hearing was had before the trial judge in the absence of the jury on the motion to suppress. The record of this hearing covers 300 pages of testimony and many exhibits. (R-1638-1932). At the conclusion of the hearing, the trial court made its written findings of fact and conclusions of law (R-1932) and they read as follows:

> "On this the 26th day of April, 1972, during the trial of the above entitled and numbered cause on its merits, came on to be heard, in the absence of the jury, the matter of the admissibility of State's Exhibit 25, allegedly made by the defendant, Terry Gene Simmons, an the matter of an alleged oral confession having been made by the defendant, and the Court having heard all of the evidence in these matters introduced by the State and the defendant, the Court finds beyond a reasonable doubt:
>
> I
>
> "That prior to the making of the alleged statement, State's exhibit 25, and the alleged oral confession, the defendant, Terry Gene Simmons, was taken without unnecessary delay before Joe Cannon, a magistrate, being a judge of the Municipal Court of the City of Houston, Harris County, Texas, and that said magistrate informed him, the said defendant, in clear language of the accusation against him and of any affidavit filed therein, of his right to have an attorney present during any interview with peace officers or attorneys representing the state; of his right to terminate the interview at any time; of his right to request the appointment of counsel if he is indigent and cannot afford counsel; of his right to an examining trial. Said magistrate also informed the defendant, Terry Gene Simmons, that he is not required to make a statement and

that any statement made by him may be used against him.

II

"That prior to the making of State's Exhibit 25, the defendant was warned by Officer Wallace J. Zeringue, the person to whom the statement was made, that he had a right to have a lawyer present to advise him either prior to or during any questioning, that if he was unable to employ a lawyer, he had the right to have a lawyer appointed to counsel with him prior to or during any questioning, and he had the right to remain silent and not make any statement at all, and any statement he made may and probably would be used against him at his trial.

III

"That the statement, State's Exhibit 25, and the oral confession aforesaid were made by the defendant, Terry Gene Simmons, freely and voluntarily, without compulsion or persuasion, and that he knowingly, intelligently, and voluntarily waived his rights in connection with the making of the said oral confession and State's Exhibit 25.

IV

"That the said oral confession was made to Officer Charles H. Atkins and contained statements of facts or circumstances which resulted in the finding of the body of Martha Ann Cook, the deceased in this cause.

"The Court holds that both State's Exhibit 25 and the oral confession were voluntarily given in accordance with law and, in particular, the rules of criminal procedure of the State of Texas, and said

written and oral statements are admissible in evidence as a matter of law.

"s/ Fred M. Hooey, Judge,
180th District Court"

Respondent states that the evidence adduced at the hearing was ample to support the trial court's findings.

The Court of Criminal Appeals of Texas carefully considered these three issues and after reading the transcript of the evidence taken at the suppression hearing wrote the following:

"The evidence adduced at the hearing reflects that appellant was arrested on an arrest warrant at his home in Houston about 7:35 P.M. on August 6, 1971. At that time, he was charged with burglary of the Cook home on August 3. The arresting officers at the time of the arrest read to appellant the 'blue card' Miranda type warning,[1] and according to their testimony same was fully explained to him, and he told them that he fully understood. Appellant was taken to a magistrate within 30 minutes after his arrest who read and explained to him his rights as provided by Art. 15.17, V.A.C.C.P. Appellant was asked by the magistrate if he understood the warning, and he replied that he did. Appellant was then taken to the police station, where

[1] The blue card containing the Miranda warning was made an exhibit, as is contained in the record.

officers interrogated him. He was again given the 'blue card' warning by officers, which included his rights to counsel, and to remain silent, and was asked if he wished to use a telephone. He stated he did not want to have a lawyer, and did not care to make a phone call. At first he denied his guilt, and at about 9:30 P.M. agreed to take a lie detector test. When he was taken to the polygraph room preparatory to executing a written agreement, and after the lie detector test was explained to him, he admitted his guilt of the burglary and murder orally to the polygraph operator. He stated that he had gone to the Cook home on his bicycle on August 2nd, entered it, and stolen some money. He returned in his mother's car on the next morning to get a television set. While in the house, he was surprised by the deceased, Martha Ann Cook. He tied her to the bed with some electrical cord, then, fearing that she could identify him and that she had seen the car license, he took her and the television set to a place on Green's Bayou in Harris County, tied her hands behind her back and to the television set, and rolled her into Green's Bayou, where he sat on her until she drowned. Appellant then offered to take the officers to the place where he had drowned deceased.

According to the evidence of the peace officers, shortly after 11:30 P.M., appellant, in a car with several officers, directed the officers to a location on Green's Bayou which he described as the place where he drowned deceased. After a search, a knob from a televi-

sion set, identified as similar to that stolen from the Cook home, was found on the bank of the stream. Subsequently, on the afternoon of August 7, as the result of the information furnished by appellant, the body of deceased was found about three miles down stream from the spot where the search started. Her hands were tied behind her back, and the body was partially decomposed.

At about 1:00 A.M. on August 7, hours before the body was found, appellant was taken back to the police station, where the Miranda warning was again given him by the investigating officers. He was asked if he wanted to have a lawyer present, and he expressly waived the presence of one, as well as the other rights specified in the warning. Thereafter, appellant agreed to make a written statement and did make one, confessing to the commission of the burglaries of the Cook home on August 2nd and 3rd, the taking of deceased to Green's Bayou, and the drowning of deceased, practically as he had stated in his previous oral confession. The confession, containing the usual warning and waiver of rights, was typed, read to appellant, who stated that he understood it, and signed by him in the presence of two television newscasters, who witnessed the signing.

Appellant testified at the hearing. He stated that he had been taking heroin with regularity about two and a half years. He went to a methadone clinic in Fort Worth

in May, 1971, and received treatment; however, he remained an addict. He had an overdose of heroin on the evening of August 4, 1971, and was taken to a hospital. He was arrested there on a heroin charge, and made bond on August 5. His last 'shot' of heroin prior to his arrest on August 6 was on the afternoon of the previous day. He was beginning to feel the need of another shot while under arrest at about 9:30 P.M., and started suffering the symptoms of heroin withdrawal. He remembered being arrested on August 6, and of being warned of his rights by the magistrate, and of being questioned by police officers. He had not had anything to eat from noon, August 6, until 3:30 or 4:00 the next morning. He asked to get in touch with his mother, but his request was ignored. He knew he had a lawyer in his heroin case, but did not ask to talk to him. He made no complaints of heroin withdrawal symptoms to the officers. He denied having volunteered to take a lie detector test. He testified that he had denied participating in the burglary case, and of any knowledge of the whereabouts of Martha Ann Cook, until he was taken in the polygraph room, and that he was influenced to make the statement he made by the heroin withdrawal symptoms and the presence of the polygraph machine, and by the statements of the operator that he had left fingerprints in the Cook home, and that money stolen from that home had been traced to him. He stated that he was forced to take the officers out to Green's Bayou, and denied agreeing to do so. He said the officer taking the oral confession agreed to drop the heroin charge if he

would admit the burglary of the Cook home. He denied having made any confession voluntarily.

Attorney John Swain, a defense witness, testified that he was employed on August 5 to represent appellant on the heroin charge. About 9:30 P.M. on August 6, while he was at a social event, he was notified of appellant's arrest. The witness went to his home and called the police department. He did not remember whether he talked with a lady or man, but he testified that he was told that the party he was talking with didn't know whether appellant had been 'talked with,' and that he was either asleep or in a cell for the night. Swain told the party he would come to the station the next morning, and hung up. He went to the jail on the morning of August 7th, and learned of the confessions. He stated that he was never denied the right to see and talk with appellant.

A licensed polygraph operator, in answer to a hypothetical question which assumed the truth of the testimony given by appellant, and also included certain testimony of State's witnesses, testified that under the facts as stated in such question, in his opinion, appellant would have been likely to have his resistance to confess overborne when confronted with the polygraph machine.

Dr. Samuel George, a psychiatrist, testified in answer to a hypothetical question which assumed the truth

of appellant's testimony, that in his opinion a person as described in the question would not be aware of what he was agreeing to, and not able to withstand interrogation.

Dr. Raeburn corroborated appellant's testimony that appellant was in his methadone clinic in Fort Worth; however, he fixed the date as June 12, 1971.

For the State, a number of peace officers who had had experience in dealing with persons under the influence of heroin, and who had participated either in the arrest of appeallant on August 6 or the subsequent interrogation of him during that night, testified that they noticed nothing about appellant's appearance or actions which might indicate that he was suffering from heroin withdrawal symptoms. The news broadcasters who witnessed the confession also testified to this effect. In the opinions of these officers and witnesses to the statement, appellant was not suffering from such symptoms.

In his written findings of fact and conclusions of law, the court found that, prior to the making of the oral and written confessions, appellant was taken without unnecessary delay before a magistrate, who properly warned him of his rights as provided in Art. 15.17, V.A.C.C.P., and that he was again advised of his rights prior to making the oral and the written confession by the officers to whom such confessions were made. The court found that the oral confession contained state-

ments of fact leading to the finding of the body of deceased. The court found that both statements were voluntarily given in accordance with law, and that they were admissible in evidence.

The record contains ample evidence to support the findings of the trial court, who, as the trier of the facts at the hearing, was free to disbelieve defense testimony. Gutierrez v. State, __ S.W.2d __, (No. 46,904, Dec. 19, 1973); Chivers v. State, 481 S.W.2d 125. There was sufficient evidence for the court to conclude that the statutory and the Miranda type warnings were adequately and timely given appeallant, and understood by him; that appellant was capable of making and did knowingly make an intelligent and voluntary waiver, and that neither the oral nor the written confession was obtained by means of a 'third degree' interrogation. As to the oral confession, the evidence discloses that the body of deceased was found as the result of the information furnished by appellant, and that he voluntarily directed the officers to the area in which the body was found about three miles down stream from where appellant stated he had thrown it in the flowing bayou. Under the evidence, the court properly admitted it. Art. 38.22, Sec. 1(e), V.A.C.C.P.; Chase v. State, __ S.W.2d __, (No. 46,796, Jan. 16, 1974); Stelman v. State, 58 S.W.2d 831.

Appellant contends that his confessions were 'tainted by his illegal detention resulting from his il-

legal arrest.' He argues that the affidavit upon which the warrant of arrest was based was insufficient to show adequate cause. It is not necessary that we decide the sufficiency of the affidavit. 'A confession otherwise shown to have been voluntary is not rendered inadmissible by the fact that its author was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right.' Morgan v. State, __ S.W.2d __, (No. 46,831, Dec. 5, 1973), citing Lacefield v. State, 412 S.W.2d 906. An examination of the evidence, supra, reflects that there was ample reason to detain appellant, and his detention did not vitiate the confessions. Hughes v. State, 409 S.W.2d 416; Dugger v. State, 402 S.W.2d 178.

Appellant furthercomplains that the confessions were taken in the 'planned absence of counsel.' The evidence of attorney Swain, a defense witness, heretofore summarized, does not support this contention. Swain testified that when he heard of the arrest of appellant he went to his (witness's) home, phoned the jail, did not know to whom he was talking, but that person told him he (or she) did not know whether appellant had been questioned, and that he was in his cell, and that Swain told this person he would be down in the morning. No further investigation was made that night by him.

The record shows that appellant understood his rights concerning legal representation, and that, so un-

derstanding, he on several occasions while under arrest and knowingly expressly waived such right. See Nash v. State, 477 S.W.2d 557.

Appellant in his brief makes a number of specific complaints which he says rendered the confessions inadmissible. We have given each of them careful consideration, and find them to be without merit."

Assuming for the sake of argument that Petitioner was illegally arrested, Respondent states that the credible evidence at Petitioner's state court trial clearly shows that any taint arising from the alleged illegal arrest was dissipated and purged by intervening circumstances occurring before Petitioner gave his statements. To support his claim that the taint was not dissipated, Petitioner argues that this Court should accept as true the testimony presented by the defense. The record reveals that there was a dispute between testimony offered by the prosecution and the defense, which the state trial court was free to and did resolve — in the prosecution's favor. The trial judge had the opportunity to observe the demeanor of the witnesses, and to make a ruling on their credibility, and he chose not to believe the testimony offered by Petitioner.

Respondent respectfully states that the resolution of that issue should not be disturbed by this Court. If Petitioner had only cited the testimony which supports the judgment of the state trial court he would have been

compelled to the opposite conclusion for his position is premised upon rejection of all testimony favorable to the finding of the state trial court below, and to unquestioning acceptance of all testimony favorable to his position. Under no view of the record, can the state trial court findings be considered erroneous.

As this Court held in *LaVallee v. Rose,* 410 U.S. 690 (1973), when a state trial court makes an adequate determination on the issue of the voluntariness of a defendant's statements, the state court findings are presumed to be correct and the burden is on a petitioner to establish by convincing evidence that the state court's determination was erroneous. In the case at bar there is no evidence that the state trier utilized the wrong standard, but there is every indication it applied the correct standards.

Beginning at page 30 of his Petition, Petitioner cites several aspects of Petitioner's alleged illegal detention that he claims indicates that the taint arising from the illegal arrest had not been dissipated. The Court of Criminal Appeals of Texas discussed each of these issues in their opinion, and found that the evidence on the issues was in conflict, but that the record contained ample evidence to support the findings of the trial court, who, as trier of the facts at the hearing was free to disbelieve defense testimony.

The evidence adduced at the suppression hearing showed that Petitioner was arrested at his home about 7:35 p.m. on August 6, 1971. The arresting officers gave Petitioner the *Miranda* warning and testified that the same was fully explained to him and he told them that he fully understood the warning. Petitioner was then taken to a magistrate within thirty minutes after his arrest. The magistrate read and explained to him his rights as provided by Article 15.17 of the Texas Code of Criminal Procedure. Petitioner was asked by the magistrate if he understood the warning, and he replied that he did. Petitioner was then taken to the police station where he was again given the *Miranda* warning by the officers, and was asked if he wished to use a telephone. He stated he did not want to have a lawyer, and did not care to make a phone call. At first he denied his guilt, and at about 9:30 p.m., approximately two hours after his arrest, he admitted his guilt of the burglary and murder.

Respondent would direct this Court's attention to *Rogers v. United States,* 330 F.2d 535 (5th Cir. 1964), where a defendant contended that his arrest was illegal and that his confession obtained as a result of that arrest was inadmissible under *Wong Sun v. United States,* 371 U.S. 741 (1963). Rogers was arrested without a warrant, and was informed by the officers that he was not required to give any information and that anything he might say could be used against him. Rogers denied his guilt. About three hours later Rogers gave a

signed confession. The Fifth Circuit distinguished *Rogers* from *Wong Sun* for in *Wong Sun* the statement by the defendant was contemporaneous with his arrest which followed a forced entry into his home by six or seven police officers.

This Court held in *Wong Sun* that it was unreasonable to infer that the defendant's statement was sufficiently an act of free will to purge the primary taint of the unlawful invasion. This Court indicated that if there is an intervention of a clear act of free will on the part of the defendant, the evidence will be purged of its stigma.

The Fifth Circuit stated in *Rogers* that taking into account the freedom from oppressive circumstances surrounding the arrest of Rogers, the three hour delay between arrest and statement, the non-continuous interrogation, and Roger's intervening refusal to confess, no violation of Roger's constitutional rights had occurred.

Respondent states that since Petitioner was not arrested under oppressive circumstances, that since he was given the *Miranda* warnings three times prior to making a statement, and was also carried before a Magistrate and warned of his rights, because he stated he did not want to have a lawyer and did not care to make a phone call, and because he first denied his guilt, the confession was not obtained by exploiting the illeg-

ality of the arrest (if the arrest were illegal) but resulted from means sufficiently distinguishable to be purged of the primary taint. See also *Thomas v. United States,* 377 F.2d 118 (5th Cir. 1967); *Leonard v. United States,* 391 F.2d 537 (9th Cir. 1968); *United States v. Smaldone,* 485 F.2d 1333 (10th Cir. 1973).

The record reveals that Petitioner was arrested at his home in Houston, Texas, by three Houston police officers and one F.B.I. agent. The arresting officer identified himself to the Defendant, read him the *Miranda* warning and then told him that he was "now charged with burglary, but that our main concern was also with the disappearance of the Cook girl, who was taken from the Cook home on August 4 in a later burglary." (R-1647). Petitioner knew therefore from the moment of his arrest that he was a suspect in the disappearance of the Cook girl.

Assuming that the arrest was illegal, the following considerations clearly reveal that the statements were admissible:

(a) The proximity of the illegal arrest to the procurement of the confession. As previously pointed out, there was a two or three hour delay between the period of arrest and the giving of the statements.

(b) Other intervening occurrences between the illegal arrest and the acquisition of the statements. The

numerous warnings given Petitioner by the police and the Magistrate, coupled with his denial of guilt, and his statement that he did not want an attorney and did not want to use the telephone.

(c) The circumstances under which the arrest was made. As pointed out Petitioner was arrested at his home, and his brother was present when the arrest was made. Petitioner contends the arrest was illegal because sufficient probable cause was not established to support the issuance of the arrest warrant. Respondent disputes this and further says that the arrest in the instant case is far removed from the gross violation of legal processes in *Wong Sun,* where six or seven police officers broke the door and followed on the defendant's heels into his bedroom where his wife and child were sleeping and immediately arrested and handcuffed him and obtained the statement.

As the Fifth Circuit held in *Rogers,* supra, at page 542

> "Although the police did exploit the circumstances of the arrest to the extent of interrogating their prisoner, there was sufficient evidence of freedom of mind to conclude that any illegality involved in the arrest could not have infected the later statements."

Finally, the question of whether *Wong Sun's* exclusionary rules applies to state court proceedings has never been directly passed on this Court, or by the circuit courts. See Footnote 7 in *Phelper v. Decker,* 401 F.2d 232 (5th Cir. 1968).

CONCLUSION

For the reasons above stated, Respondent says there was no denial of Petitioner's constitutional rights. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on June 28, 1974, I mailed copies of Respondent's Brief In Opposition to Mr. Jimmy James, Attorney at Law, 620 Houston Bar Center Building, Houston, Texas 77002.

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June 28, 1974.